No. 80-741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HIDALGO COUNTY GRAND JURY COMMISSIONERS, *et al.*

—v.—

CIUDADANOS UNIDOS DE SAN JUAN, *et al.*

DELLIS PRATER, *et al.*

—v.—

ROBERT CABALLERO, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES.....i

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....9

ARGUMENT.....10

I. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT THE CITIZENS HAVE SHOWN A CONTINUING CASE AND CONTROVERSY WITH REGARD TO THE OFFICIALS' SUCCESSORS IN OFFICE.....10

II. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT A CASE OR CONTROVERSY CONTINUES TO EXIST BETWEEN THE CITIZENS AND THE OFFICIALS OVER THE HISTORICAL AND STATISTICAL DISCRIMINATION IN THE GRAND JURIES OF BOTH COUNTIES.....15

A. The Citizens Have Shown That the Grand Jury Discrimination Will Continue Against Them in the Future..15

B. The Citizens Clearly Have Standing to Attack Their Unconstitutional Exclusion from Grand Jury Service.....19

III. THIS CASE DOES NOT PRESENT A QUESTION OF JUDICIAL IMMUNITY...21

CONCLUSION.....

TABLE OF AUTHORITIES

Case: Page:

Berry v. Cooper, 577 F.2d 322 (5th Cir. 1978).....4

Boddie v. Connecticut, 401 U.S. 371 (1971).....2

Carter v. Jury Commission, 396 U.S. 320 (1970).....9, 17, 19

Castaneda v. Partida, 430 U.S. 482 (1977).....passim

Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977).....23

Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972).....23

Ex Parte Virginia, 100 U.S. 339 (1880).....9, 21

Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).....22

Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967).....2

Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975).....23

Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971).....23

Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 123 (S.D.N.Y. 1969), aff'd on other grounds, 401 U.S. 154 (1971)...23

Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds sub nom O'Shea v. Littleton, 414 U.S. 488 (1974).....23

TABLE OF AUTHORITIES--Continued

Case: Page:

Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).....10, 11

Mitchum v. Foster, 407 U.S. 225 (1972).....23

Network Project v. Corporation for Public Broadcasting, 561 F.2d 963 (D.C. Cir. 1977), cert. denied, 434 U.S. 1068 (1978).....10, 11

Nicholson v. Board of Commissioners of Alabama Bar, 338 F.Supp. 48 (M.D. Ala. 1972).....23

O'Shea v. Littleton, 414 U.S. 488 (1974).....16

Person v. Association of Bar of New York, 554 F.2d 534 (2d Cir. 1977), cert. denied, 434 U.S. 924 (1977)....22

Rose v. Mitchell, 443 U.S. 545 (1979).....17, 19

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911).....17

Spomer v. Littleton, 414 U.S. 154 (1974).....12, 13

Stump v. Sparkman, 435 U.S. 349 (1978).....23

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980).....21

TABLE OF AUTHORITIES--Continued

Case: Page:

Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975).....23

Turner v. Fouche, 396 U.S. 346 (1970).....19

Warth v. Seldin, 422 U.S. 490 (1975).....2, 20

Statute:

Federal Rule of Civil Procedure Rule 25(d).....10

Texas Code of Criminal Procedure Article 19.06.....18

Treatise:

7A Wright & Miller, Federal Practice and Procedure: Civil §1960 (1972)...11

STATEMENT OF THE CASE

Because the Hidalgo County action was dismissed as a result of defendants' motion under Federal Rule of Civil Procedure 12(b)(1) and (6), and the Willacy County suit was dismissed by the District Court sua sponte, even before service on the defendants, the citizens' allegations of a historical and on-going systematic pattern of exclusion and underrepresentation of Mexican-Americans, women, the poor, and the young from grand juries must be taken as true in deciding whether the District Court had jurisdiction and whether the citizens stated a cause of action.[1/]

[1/] For purposes of brevity and simplicity in this brief:
(1) the cause of Hidalgo County Grand Jury Commissioners, et al. v. Ciudadanos Unidos de San Juan, et al. is referred to as the "Hidalgo County" case;
(2) the cause of Dellis Prater, et al. v. Robert Caballero, et al. is referred to as the "Willacy County" case;

(footnote continued on next page)

Warth v. Seldin, 422 U.S. 490, 501 (1975); Boddie v. Connecticut, 401 U.S. 371, 373 (1971); Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 172 (1967).

The nineteen individual citizens in the two class actions before this Court are all Mexican-American. Some are also female, young, and/or poor persons. All the citizens, except two, have been denied service on their respective county grand juries. Two Mexican-American political action organizations are also Respondents in the Hidalgo County case.

In October 1976, the Hidalgo County citizens filed a class action against the officials who had selected twenty prospective grand jurors and the District Judge

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(footnote continued from preceding page)

(3) the Respondents in either case are referred to as "the citizens"; and

(4) the Petitioners in either case are referred to as "the officials."

who had selected the officials.

The citizens alleged continuing and systematic exclusion and underrepresentation of Mexican-Americans, women, the young, and the poor on Hidalgo County grand juries over the ten years prior to their suit. According to the 1970 United States Census, approximately 79% of Hidalgo County residents are of Mexican descent; women comprise 52% of the population; about 50% of the people have incomes below the government-designated poverty level; and 16% of the population is between the ages of 18 and 28.

In spite of their high representation in Hidalgo County, those four groups have been grossly underrepresented on grand juries since January 1966. Mexican-Americans constituted only 44% of grand jurors chosen over that period, an underrepresentation of -.36 and a disparity of

-.45.[2/] Only 22% of the grand jurors were women, an underrepresentation of -.30 and a disparity of -.57. Since virtually no poor people served on the grand juries, they were -.50 underrepresented, a disparity of -1.00. Similarly, no young people served as grand jurors, an underrepresentation of -.16 and a disparity of -1.00.

When the complaint was filed, this Court had granted a Petition for Certiorari in Partida v. Castaneda, 524 F.2d 481 (5th Cir. 1975). Partida, a state prisoner, had challenged the same Hidalgo County grand

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[2/] Disparity=$\frac{\text{Underrepresentation of group}}{\text{\% of group in population}}$

Underrepresentation=% of group in population minus % of group in grand juries. See generally Berry v. Cooper, 577 F.2d 322, 326 n.11 (5th Cir. 1978). In Castaneda v. Partida, the words "disparity" and "underrepresentation" are used interchangeably for the concept here expressed as "underrepresentation" only. 430 U.S. 482 (1977).

jury selection process by habeas corpus petition. The Fifth Circuit found that Partida had made out a prima facie case of grand jury discrimination, which Hidalgo County had not rebutted, and reversed the District Court--the same Court which dismissed both the Hidalgo and Willacy County actions here.

The District Court, on its own motion, held the Hidalgo County case in abeyance until the Court decided Castaneda v. Partida, 430 U.S. 482 (1977), affirming the Fifth Circuit.

Thereupon, the officials moved to dismiss the action; and the District Court, without a hearing, did so, essentially on the ground that the discretion inherent in the Texas grand jury system rendered it unamenable to judicial relief, despite the apparently controlling nature of Castaneda. The citizens then appealed to the Fifth Circuit, where they prevailed.

In November 1977, the Willacy County citizens filed a class action against the officials who were about to select the grand jurors from whom the Willacy County Grand Jury would be chosen.

Those citizens alleged continuing and systematic underrepresentation of Mexican-Americans, Mexican-American women, women generally, the young, and the poor on Willacy grand juries over the prior ten years. According to the U.S. Census, approximately 77% of Willacy County residents are of Mexican descent; Mexican-American women make up 40% of the County; women generally comprise 52% of the population; 57% of the people have incomes below the government-designated poverty level; and 16% of the population is between the ages of 18 and 28.

Despite their high representation in the population, those five groups have been

grossly underrepresented on Willacy grand juries since at least January 1968. Mexican-Americans constituted only 35% of grand jurors chosen over that period, an underrepresentation of -.42 and a disparity of -.55. Only 9% of the grand jurors were Mexican-American women, an underrepresentation of -.31 and a disparity of -.78. Only 25% of the grand jurors were women, an underrepresentation of -.27 and a disparity of -.52. Since virtually no poor people served on the grand juries, they were -.57 underrepresented, a disparity of -1.00. Similarly, no young people served as grand jurors, an underrepresentation of -.16 and a disparity of -1.00.

The District Court sua sponte dismissed the action without hearing and before process was served. The citizens then appealed to the Fifth Circuit, which consolidated their case with the Hidalgo County action. They also prevailed.

In both cases, the citizens sought a declaratory judgment that Mexican-Americans, women, young and poor people have been and are still systematically excluded from grand juries in violation of the United States Constitution. They further sought injunctive relief to insure that present and future officials do not exclude their cognizable groups from grand jury service. The Hidalgo County citizens also sought injunctive and declaratory relief against the Judge who had named the officials.

The citizens have alleged the same pattern of historical statistical deviations faulted in Castaneda, 430 U.S. at 496-97, and declared there (in footnote 17) as a statistically improbable chance occurrence under the Rule of Exclusion.

SUMMARY OF ARGUMENT

These cases raise no issues that require this Court's attention; to the contrary, the insubstantial claims raised by the officials are easily disposed of under this Court's grand jury discrimination and Article III precedents.

Simply put, these cases present live controversies because the historical pattern of discriminatory exclusion of plaintiffs from grand jury service continues and will continue, unless there is judicial relief. The citizens plainly have standing to bring these cases, Carter v. Jury Commission, 396 U.S. 320 (1970), and the state court judge is not protected by immunity because he was performing a ministerial function in appointing the officials. Ex Parte Virginia, 100 U.S. 339, 348 (1880). The history of grand jury discrimination in the counties shows that the successors-in-office to the officials will continue the discrimination Respondents complain of.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT THE CITIZENS HAVE SHOWN A CONTINUING CASE AND CONTROVERSY WITH REGARD TO THE OFFICIALS' SUCCESSORS IN OFFICE.

Federal Rule of Civil Procedure 25(d) provides for the automatic substitution of the successors of state officers who have been sued in their official capacities. The successor can challenge the substitution; and at that point, the plaintiff needs to show that the successor will likely continue the predecessor's policy.

In cases involving patterns of discrimination, the plaintiff must establish some basis to believe that the successor will continue the practices of the predecessor before prospective coercive relief against the successor is warranted. See Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 622 (1974); Network Project v. Corporation for Public Broadcasting,

561 F.2d 963, 966-68 (D.C. Cir. 1977), cert. denied, 434 U.S. 1068 (1978).

Those holdings indicate or imply that, should defendants contest the presence of a continuing controversy, the courts should hold a specific hearing on the matter. Mayor of Philadelphia, 415 U.S. at 622. See 7A Wright & Miller, Federal Practice and Procedure, Civil §1960 (1972), at 682. There has been no such hearing in these cases, and accordingly the officials' successor argument is at this time premature.

In any event, the facts the citizens have alleged constitute a sufficient basis to believe that the successors will continue the practices of their predecessors.

The complaints allege in precise detail ten years of grand jury discrimination. The Court can also notice the facts in Castaneda v. Partida, 430 U.S. 482, where

the eleven-year period (1962-72) of discrimination at issue overlaps in part with the ten-year period (1967-1976) in the Hidalgo County case. Putting those together, one sees a factual, historical pattern of discriminatory grand juries in the affected area for at least fifteen years.

Thus, despite Castaneda, a seemingly intractable and long-standing pattern of discrimination in these counties has continued to this day. Assuming that these facts are true, neither this Court's cases nor Article III preclude relief, as Judge Goldberg's decision carefully demonstrates. Pet. App. at A25-A33.

Spomer v. Littleton, 414 U.S. 154 (1974), upon which the officials so heavily rely, is easily distinguished. In Spomer, the claim focused on an official's personal racial discrimination toward minority persons. It was not alleged that his successor

would continue the same discrimination, and the plaintiffs never even attempted to substitute the successor.

Spomer contrasts sharply with the cases here, where there is a longstanding pattern of historical discrimination against Mexican-Americans, women, and poor and young people in south Texas. That historical pattern has been perpetuated without interruption by a series of numerous grand jury commissioners for as far back as eighteen years, and there is every reason to believe the pattern will continue into the future.

The citizens alleged in their suits that the successors of the officials will continue the practices of the officials; and they pleaded their class actions on that premise. Although the Petitioners will have an opportunity at trial to show that they have taken actions sufficient to end the historical pattern and practice of

discrimination, the allegations must at this point be taken as true.

Finally, the successor argument is further weakened by the fact that some of the named officials will undoubtedly serve again as grand jury commissioners. In Hidalgo County, 30% of the commissioners serve as such more than one time; and 10% serve more than twice.

The citizens thus met their burden of alleging that the controversy with the named officials continues as to their successors.

The officials' petition should be denied and the citizens should be given the opportunity to prove their allegations at trial.

II. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT A CASE OR CONTROVERSY CONTINUES TO EXIST BETWEEN THE CITIZENS AND THE OFFICIALS OVER THE HISTORICAL AND STATISTICAL DISCRIMINATION IN THE GRAND JURIES OF BOTH COUNTIES.

A. The Citizens Have Shown That the Grand Jury Discrimination Will Continue Against Them in the Future.

Allegations of past illegal conduct without continuing impact do not in themselves establish a live controversy. However, the citizens have properly alleged that the injury of which they complain continues and will continue in the future, and, for present purposes, that allegation must be taken as true.

Even though the compilation of each grand jury list is a discrete act, the historical pattern and practice of compiling some forty lists over a ten-year period (seventy lists over eighteen years) has clearly produced grand juries in each county which have excluded the citizens

and members of the classes which they represent. In light of that factual pattern, the citizens' claim that the grand jury selection statutes have been and will continue to be applied discriminatorily and unconstitutionally by the officials and their successors is plainly sufficient for Article III purposes.

The citizens' cases are not like O'Shea v. Littleton, 414 U.S. 488 (1974), where the wrongful conduct complained of was the personal conduct solely of a former State's Attorney, where there was a no claim that his successor would continue such wrong conduct, and where plaintiffs had made no attempt to substitute or seek injunctive relief against the newly-elected State's Attorney.

The officials' position is disingenuous. They assert that "the present action was moot from the outset, at no time presenting a live controversy." Petition for

Certiorari, p.11. Their position clearly underlines the problem in these cases. The Grand Jury Commissioners serve just long enough to name the grand jurors, and at the pleasure of the state judge. Even if they are sued before they select the potential grand jurors but the District Court does not grant immediate relief, as in these cases, the officials are free to choose whom they wish and, an hour later, are no longer Commissioners. These are classic cases "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). There is no way of presenting more procedurally appropriate claims than the citizens did; and they should be able to litigate those claims. Cf. Rose v. Mitchell, 443 U.S. 545, 558 (1979); Carter v. Jury Commission, 396 U.S. 320 (1970).

The historical pattern of discrimination against the groups represented by the

citizens is so substantial and significant that their future exclusion from grand jury service is "real and immediate," certainly not "conjectural" or "hypothetical."

Nor does the fact that, in 1979, Texas enacted an optional grand juror selection scheme create a mootness problem for the citizens.

First, the scheme is only optional. Second, the officials have made no commitment to employ that system, and, in fact have not done so.

Similarly, enactment of Article 19.06 of the Texas Code of Criminal Procedure, which mandates that the grand jurors represent a cross-section of the county, taking into consideration factors of race, sex, and age, also does not moot this case because it simply embodies the constitutional requirements to which Texas has always been subject.

B. The Citizens Clearly Have Standing to Attack Their Unconstitutional Exclusion from Grand Jury Service.

Contrary to the officials' position, it is well-settled that civil class actions like these can be maintained by victims of the officials' exclusionary practices. Carter v. Jury Commission, supra; Turner v. Fouche, 396 U.S. 346 (1970). Cf. Rose v. Mitchell, 443 U.S. at at 558. In Carter, the Court stated:

> Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion. Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here. The federal claim is bottomed on the simple proposition that the State, acting through its agents, has refused to consider the appellants for jury service solely because of their race.

396 U.S. at 329-30 (footnotes omitted; emphasis added).

Persons in the citizens' position have a right to be free from systematic exclusion from grand jury service, and they are aggrieved and injured by such exclusion. They have a personal stake in the outcome of these cases, and they have a right to assert those claims. Warth v. Seldin, 422 U.S. 490, 498-501 (1975).

III. THIS CASE DOES NOT PRESENT A QUESTION OF JUDICIAL IMMUNITY.

This case does not present the question, offered as a basis for certiorari by Petitioners, whether judges should be held immune from injunctive and declaratory relief as well as damages, a question reserved in Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980). The reason is plain: In choosing grand jurors, the defendant judges here acted not in a judicial capacity, but rather in an enforcement or administrative capacity. It is not part of the judicial function to choose three to five persons to serve as grand jury commissioners. See Pet. App. at A11 n.16. As the Supreme Court stated in Ex Parte Virginia, 100 U.S. 339, 348 (1880):

> Whether the act...was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was

> a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge....In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadwaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. (Emphasis added.)

Accordingly, even if judicial immunity applied generally to equitable actions against judges acting in their judicial capacities, it would not apply here.[3/] Ex Parte

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[3/] Should the Court disagree with our analysis and find the question properly presented on this record, we believe there is no need to disturb the Fifth Circuit's resolution of this issue; no real conflict exists. The courts are in near-unanimous agreement that judges are subject to §1983 actions for declaratory and injunctive relief. See Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973); Person v. Association of Bar of

(footnote continued on next page)

Virginia, supra; Stump v. Sparkman, 435 U.S. 349, 360-63 (1978); Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. at ___, 64 L.Ed.2d at 656.

(footnote continued from preceding page)

New York, 554 F.2d 534 (2d Cir. 1977), cert. denied, 434 U.S. 924 (1977); Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds sub nom O'Shea v. Littleton, 414 U.S. 488 (1974); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972); Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971); Nicholson v. Board of Commissioners of Alabama Bar, 338 F.Supp. 48, 52 n.4 (M.D. Ala. 1972) (three-judge court); Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 123 (S.D. N.Y. 1969) (three-judge court), aff'd on other grounds 401 U.S. 154 (1971). This Court has allowed equitable suits with judges named as defendants. E.g. Mitchum v. Foster, 407 U.S. 225 (1972). Of the cases cited by Petitioners for the contrary proposition, we note that the only two which actually appear to support them are no longer good law in their circuits. See Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. at ___, 64 L.Ed.2d at 655 n.13; see also id. at 656 n.14.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated:

January 29, 1981

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